

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

FRUTH INC. d/b/a FRUTH PHARMACY,

Plaintiff,

v.

Civil Action No. 3:18-cv-01288

NEC NETWORKS, LLC d/b/a CAPTURERX,

Defendant.

NOTICE OF REMOVAL

Defendant, by and through its undersigned counsel, removes the above captioned civil action from the Circuit Court of Mason County, West Virginia, in which it is now pending, to the United States District Court for the Southern District of West Virginia, Huntington Division, pursuant to 28 U.S.C. §§1332, 1441, and 1446. Pursuant to 28 U.S.C. §1446(a), copies of all process, pleadings and orders served upon and received by the Defendant are attached as Exhibit A. A copy of the Docket Sheet of the Circuit Court of Mason County, West Virginia, as of September 5, 2018, is attached as Exhibit B.

As grounds for removal, Defendant states:

INTRODUCTION

1. On July 9, 2018, Plaintiff, Fruth Inc. d/b/a Fruth Pharmacy ["Fruth"], commenced this action in the Circuit Court of Mason County, West Virginia by filing a Complaint naming as the Defendant NEC Networks, LLC d/b/a CaptureRX ["Defendant"]. Fruth's Complaint was assigned Civil Action No. 18-C-59.

2. On August 13, 2018, service of the Summons and Complaint was effected upon the Defendant.

3. This Notice of Removal is filed pursuant to 28 U.S.C. §§1441 and 1446 on behalf of the Defendant. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because the parties are of diverse citizenship and the claims at issue exceed the sum of Seventy Five Thousand Dollars (\$75,000.00), exclusive of interest and costs.

THE COMPLAINT

4. The Complaint asserts claims for Breach of Contract (Count I), Negligence (Count II) and Breach of Fiduciary Duty (erroneously denominated Count II). It seeks an award of monetary damages, including direct, consequential and incidental damages, as well as punitive damages. It also asserts a claim for attorney fees and costs.

5. All of the claims in the Complaint arise from the alleged failure of the Defendant to process claims in accordance with various Pharmacy Services Agreements, Pharmacy Network Agreements and amendments. Specifically, the Complaint identifies nine (9) separate agreements involving nine (9) different healthcare providers which are allegedly at issue.¹

GROUND FOR REMOVAL

6. Fruth is a West Virginia corporation with its principal place of business located in Point Pleasant, West Virginia. Complaint ¶1.

7. Defendant, NEC Networks, LLC d/b/a CaptureRX is alleged to be a Texas corporation with its principal place of business located in San Antonio, Texas. Complaint ¶2.

8. Defendant is actually a limited liability company organized and existing under the laws of the State of Texas. Its members are Lyle Hotchkiss, Wilbert Joseph Tauzin, II, Christopher Hotchkiss, Edward Gilmartin, Talmage Whitehead and Hotchkiss Holdings, LLC. Lyle Hotchkiss is a citizen and resident of the State of Texas. Wilbert Joseph Tauzin, II is a citizen and resident of the State of Virginia. Christopher Hotchkiss is a citizen and resident of the State of Texas. Edward Gilmartin is a citizen and resident of the State of Texas. Talmage Whitehead is a citizen and resident of the State of Arkansas. Hotchkiss Holdings, LLC is a limited liability company organized and existing under the laws of the State of Texas. Its members are Lyle Hotchkiss, Ellen Hotchkiss, Richard Hotchkiss, Julie D. Mooney, Suellen

¹ The agreements identified in the Complaint include: (1) the Valley Health Agreements; (2) the PVH Agreements; (3) the Hopewell Agreements; (4) the FamilyCare Agreements; (5) the RGH Agreements; (6) the Wirt County Agreements; (7) the Roane County Agreements; (8) the Ironton-Lawrence County Agreements; and (9) the Thomas Memorial Agreements.

Hotchkiss, Susan Beth Luttrell and Mark A. Hotchkiss. Lyle Hotchkiss, Ellen Hotchkiss, Suellen Hotchkiss, Susan Beth Luttrell and Mark A. Hotchkiss are all citizens and residents of the State of Texas. Richard Hotchkiss is a citizen and resident of the State of Michigan. Julie D. Mooney is a citizen and resident of the State of Kentucky.

9. "For purposes of diversity jurisdiction, an unincorporated association, such as a limited liability company, is deemed to be a citizen of each state in which its members are citizens." *Hunt v. Brooks Run Mining Company*, Civil Action No. 1:13-0433, 2013 U.S. Dist. LEXIS 128641, at *4 (S.D. W.Va. Sept. 10, 2013) (unpublished) (Faber, J). "Furthermore, the principal place of business test applicable to corporate citizenship does not apply to a limited liability company." *Id.* at *5. See also *Cent. W.Va. Energy Co. v. Mt. State Carbon, LLC*, 636 F.3d 101, 103 (4th Cir. 2011) ("For the purposes of diversity jurisdiction, the citizenship of a limited liability company is determined by the citizenship of all of its members.") (Citing *Gen. Tech. Applications, Inc. v. Exro Ltd.*, 388 F.3d 114, 121 (4th Cir. 2004)).

10. Based on the damages sought, which include direct, consequential, incidental and punitive damages, as well as and attorney fees, the amount in controversy exceeds the sum of Seventy Five Thousand Dollars (\$75,000.00).

11. Because Fruth and the Defendant are citizens and domiciliaries of different states and because the amount in controversy requirement is satisfied, removal of this case pursuant to 28 U.S.C. § 1441(a) is appropriate based on the diversity of citizenship under 28 U.S.C. § 1332.

TIMELINESS OF REMOVAL

12. Pursuant to 28 U.S.C. § 1446(b)(1), this Notice is timely, being filed within thirty (30) days of service on Defendant.

13. Pursuant to 28 U.S.C. § 1446(d), Defendant is providing written notice of this Notice of Removal to Fruth and a copy of this Notice of Removal is being filed with the Clerk of Circuit Court of Mason County.

WHEREFORE, notice is given that this action is removed from the Circuit Court of Mason County, West Virginia to the United States District Court for the Southern District of West Virginia, Huntington Division.

**Counsel for NEC Networks, LLC
d/b/a CaptureRX,**

By Counsel

/s/Jeffrey M. Wakefield
Jeffrey M. Wakefield, Esq. (WV Bar No. 3894)
Jason L. Holliday, Esq. (WV Bar No. 12749)
Flaherty Sensabaugh Bonasso, PLLC
200 Capitol Street
P. O. Box 3843
Charleston, West Virginia 25338-3843
304-345-0200
304-345-0260 fax
JWakefield@flahertylegal.com
JHolliday@flahertylegal.com
Counsel for NEC Networks, LLC
d/b/a CaptureRX

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Defendant.

CERTIFICATE OF SERVICE

I, undersigned counsel for The Dow Chemical Company and Union Carbide Corporation, do hereby certify that on this 10th day of September, 2018, the foregoing “**NOTICE OF REMOVAL**” was served upon counsel of record, via regular U.S. Mail:

Dan Earl, Esquire
J.H. Mahaney, Esquire
Dinsmore & Shohl, LLP
611 Third Avenue
Huntington, WV 25701
Counsel for Plaintiff

/s/Jeffrey M. Wakefield
Jeffrey M. Wakefield, Esq. (#3894)